IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number 05-14192
JOE DAVID JOHNSON	)	
AKA JOE JOHNSON	)	
	)	
Debtor	)	
	)	
CREDIT UNION OF TEXAS	)	
	)	
Movant	)	
	)	
vs.	)	
	)	
JOE DAVID JOHNSON	)	
AKA JOE JOHNSON	)	
	)	
Respondent	)	

ORDER

These matters come before the Court on objections to confirmation filed by Credit Union of Texas. These are core proceedings over which the Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(L).

As set forth below, Credit Union of Texas' objection is **SUSTAINED** in part and **OVERRULED** in part and the case is continued for Debtor to file a modification to his Chapter 13 plan consistent with the following ruling.

FINDINGS OF FACT

Debtor Joe Johnson purchased a Nissan Quest on April 27, 2005, financing with Credit Union of Texas[1] $15,492.64 of the purchase price at 20.90% annual percentage rate. On December 30, 2005, within 910 days of Debtor's purchase of the vehicle, Debtor filed a Chapter 13 bankruptcy petition. In connection with the debt, a proof of claim was filed on behalf of Credit Union of Texas in the initial amount of $15,388.70 secured, and subsequently amended to $16,067.19 secured at 20.90% interest.

Debtor's amended Chapter 13 plan provides that Credit Union of Texas:

> ... HOLDS A PMSI [PURCHASE MONEY SECURITY INTEREST] IN A MOTOR VEHICLE SECURING A DEBT WHICH IS THE SUBJECT OF A

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[1] For purposes of this opinion, the court is addressing the argument involving the hanging paragraph following 11 U.S.C. §1325(a)(9) as though no claim objection has been filed by the Debtor; however, in subsequent pleadings, Debtor has objected to Movant's proof of claim. On January 17, 2006, "Centrix Loan Trust" filed a proof of claim asserting a secured claim in the amount of $15,388.70. Thereafter on February 6, 2006, this proof of claim was amended in the name of "Credit Union of Texas" reflecting a secured claim of $16,067.19 at 20.90% interest. On April 18, 2006, Debtor objected to the proof of claim, acknowledging a claim of $15,388.70, but challenging whether "Credit Union of Texas" is the real party in interest to the claim. Movant's response indicates that the lien claimant, Centrix Financial LLC is the serving agent and attorney in fact for the creditor and that the Debtor's objection should be overruled. Subsequently, on May 30, 2006, the proof of claim was amended to reflect "Centrix Funds LLC" as the creditor. For purposes of this opinion only, the claim is treated as though no objection has been filed.

> CLAIM DESCRIBED IN THE 'HANGING PARAGRAPH' AFTER 11 U.S.C., [SIC] 1325(a)(9); BECAUSE 11 U.S.C. §506 SHALL NOT APPLY TO SUCH CLAIM AND BECAUSE THE ESTABLISHMENT OF WHAT CONSTITUTES A SECURED CLAIM IS OBTAINED ONLY BE REFERENCE TO SEC. 506, THEREFORE THE CLAIM SHALL BE ALLOWED AS WHOLLY UNSECURED to be paid ... without interest.[2]

Credit Union of Texas objects to confirmation of Debtor's proposed plan on the basis that Debtor's proposed treatment of its claim violates the provisions of 11 U.S.C. §1325(a). The Chapter 13 Trustee also objects to confirmation of the Debtor's bankruptcy plan because of its proposed treatment of Credit Union of Texas' claim, and for other reasons not addressed in this opinion.

CONCLUSIONS OF LAW

The issues before the court concern the meaning of the unnumbered paragraph inserted at the end of 11 U.S.C. §1325(a)(9) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which the Debtor refers to as the "hanging paragraph." The pertinent language of this section is:

> For purposes of [§1325(a)(5)], section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle ... acquired for the personal use of the debtor ....

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[2] (Debtor's Chapter 13 Plan and Motion - Amended, No. 05-14192 (Bankr. S.D. Ga. filed Feb. 2, 2006)).

11 U.S.C. § 1325(a)(*).[3]

The parties agree that the treatment of Credit Union of Texas' claim falls within the parameters of BAPCPA's 11 U.S.C. §1325(a)(*); however, they disagree as to the effect this language has upon the claim. Debtor argues that while the "existence" of a lien is determined by applicable nonbankruptcy law, the "treatment" of a lien is determined by bankruptcy law. Without reference to §506, Debtor argues, there can be no "allowed secured claim" in a Chapter 13 bankruptcy, and without an "allowed secured claim," §1325(a)(5) does not apply. Therefore, Debtor argues that such creditors retain their liens but their claims in bankruptcy are unsecured.

Conversely, Credit Union of Texas and the Chapter 13 Trustee argue that the hanging paragraph of §1325 merely means Credit Union of Texas' claim cannot be bifurcated into a "secured" claim for the value of the vehicle and an "unsecured" claim for the remaining balance. Credit Union of Texas argues that the hanging paragraph requires the Debtor to pay the full amount of its claim plus interest at the contract rate.

The two issues before the court are: (1) whether the language "for purposes of [§1325(a)(5)], section 506 shall not apply" results

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[3] For ease of reference, this provision is referred to in this opinion as the "hanging paragraph" or "§1325(a)(*)."

in the creditor's lien being allowed, but treated as unsecured throughout the pendency of the debtor's bankruptcy; and (2) the appropriate interest rate to be paid on such claims.

As discussed below, I find that the hanging paragraph of §1325 means that claims falling within the parameters of the paragraph must be paid in full and cannot be bifurcated into secured and unsecured claims. Furthermore, I find that the hanging paragraph does not prevent the application of 11 U.S.C. §1322(b)(2) to such claims and therefore the interest rate does not have to be calculated at the contract rate.

Claim Treatment

Section 11 U.S.C. 1325(a) establishes confirmation criteria for Chapter 13 bankruptcy plans. Under 11 U.S.C. §1325(a)(5)[4] there are

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[4]Section 1325(a)(5) provides:

> (a)...[T]he court shall confirm a plan if-
> .
> .
> .
> (5) with respect to each allowed secured claim provided by the plan-
> (A) the holder of such claim has accepted the plan;
> (B)(I) the plan provides that-
> (I) the holder of such claim retain the lien securing such claim until the earlier of-
> (aa)the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and

three possible treatments for secured claims: (1) the creditor accepts the debtor's proposed treatment of its claim; (2) if the creditor does not accept the proposed treatment, the plan will be confirmed if the creditor retains its lien and receives payments as dictated by §1325(a)(5)(B); or (3) the debtor must surrender the collateral to the creditor. Id.

Debtor argues that the only way to obtain an "allowed secured claim" for bankruptcy purposes is through 11 U.S.C. §506. Since

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(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if-

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II)the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim.

Id.

§1325(a)(*) makes §506 inapplicable for purposes of §1325(a)(5), Debtor argues that such creditors cannot be treated as secured creditors under §1325(a)(5) and therefore such creditors retain their liens but are unsecured creditors for bankruptcy purposes and only entitled to receive prorata distributions with the other unsecured creditors. The court disagrees with this assertion and agrees with the reasoning and conclusions set forth DaimlerChrysler Fin. Services Americas, LLC v. Brown (In re Brown), 339 B.R. 818 (Bankr. S.D. Ga. 2006) which holds that the hanging paragraph merely means that such claims cannot be bifurcated into secured and unsecured claims. Id. at 820.

The pertinent part of 11 U.S.C. §506 provides:

> [a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

Id.

As cited in Brown, the Supreme Court also has held that "allowed secured claim" of §506 need not be read as a defined term; rather the words should be read on a term-by-term basis. In re Brown, 339 B.R. at 821, (citing Dewsnup v. Timm, 502 U.S. 410, 415, 112 S.Ct. 773, 776, 116 L.Ed.2d 903, 909 (1992)). The same analysis applies to the comparison of " In re Brown, 339 B.R. at 821. in §506 and

"allowed secured claim" in §1325(a)(5). " In re Brown, 339 B.R. at 821. "It is neither necessary nor appropriate to contort §506(a) into a definitional provision." Id. Whether a claim is "allowed" is determined pursuant to 11 U.S.C. §502. "The ... relationship between §506(a) and 'allowed secured claim' in §506(d) [as established in Dewsnup] also applies to the relationship between §506(a) and 'allowed secured claim' in §1325(a)(5) permitting bifurcation of an allowed claim under §506(a) into secured and unsecured portions in contravention of nonbankruptcy law, nothing more." In re Brown, 339 B.R. at 821.

As stated in Brown and in Debtor's brief, §502 determines whether a claim is deemed "allowed." Section 502(a) provides "[a] claim or interest, proof of which is filed under section 501 ... is deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a). Then, as noted in Brown, the court must determine whether the debt is secured by a lien. Id. at 821. "Lien" is defined as a "...charge against or interest in property to secure payment of a debt ...." 11 U.S.C. §101(37). The secured nature of a claim is determined pursuant the underlying debt and the Debtor has not contested the nature of Credit Union of Texas' claim.[5] In fact, Debtor admits that Credit Union of Texas holds a valid lien under

[5] See footnote 1, supra.

state law, that the lien was duly and timely perfected and as a result Credit Union of Texas holds a secured claim. (Debtor's Supplemental Mem. of Law, 3). While acknowledging the secured nature Credit Union of Texas' claim, the Debtor argues that its "treatment" is determined by federal bankruptcy law, rather than substantive nonbankruptcy law.

As noted in Brown, following the term-by-term analysis set forth in Dewsnup, because claims are "allowed" under §502 and "secured" under state law, they are "allowed secured claims" for purposes of §1325(a)(5) and debtors' treatment of such claims must satisfy the present value analysis of §1325(a)(5)(B)(ii) without the bifurcation treatment allowed to non-1325(a)(*) claims. In re Brown, 339 B.R. at 821.

Traditionally, 11 U.S.C. §506(a)(1) has been used to bifurcate secured creditors claims on motor vehicles into "secured" claims for the value of the vehicle and "unsecured" claims for the remaining balance. The Supreme Court analyzed §506(a) in detail and recognized the bifurcation of such claims and the proper valuation mechanism. Associates Commercial Corp. v. Rash, 520 U.S. 953, 961, 117 S.Ct. 1879, 1884-85, 138 L.Ed. 2d 148 (1997). Other provisions of §506 allow the holder of a secured claim to receive post-petition interest, fees, costs and charges; permit the trustee to recover

certain costs and expenses; and allow certain liens to be avoided. 11 U.S.C. §506. Debtor argues that §506 dictates whether a claim will be treated as secured for bankruptcy purposes. However as In re Brooks 344 B.R. 417 (Bankr. E.D. N.C. 2006) notes, "Section 506 modifies the rights of creditors, secured by a lien under state law, by allowing their claim to be treated as unsecured if the value of the creditor's collateral is less than the amount of the claim. If §506 does not apply, the rights of the secured creditor under state law are not modified and the claim remains fully secured." In re Brooks, 344 B.R. at 422.[6]

Debtor proposes to recognized Credit Union of Texas' lien but to treat it as an unsecured claim allowing the creditor to retain its lien and partake in the Chapter 13 distributions in accordance with its prorata share of the total unsecured claims. The Debtor proposes a plan of at least 36 months with a proposed distribution to unsecured creditors of 1%. Merely retaining a lien and receiving

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[6] Debtor cites an unpublished opinion from the Fourth Circuit in support of its position that claim status is determined by §506. See, Bailey v. Bailey, 153 F.3d 718 (4th Cir. 1998). However, as noted in Brooks, Bailey stands for the proposition that if §506 is applicable, an allowed secured claim must be valued thereunder. In re Brooks, 334 B.R. at 420 n.5. Since §1325(a)(*) renders §506 inapplicable to certain claims, such claims are not valued under §506, and therefore must be treated as fully secured. Id. In addition, as noted by Debtor, the Bailey creditor did not have a valid secured claim under state law, so the issue was never squarely addressed.

a 1% dividend on a rapidly depreciating asset does not fulfill the language of the hanging paragraph which requires such claims be treated as fully secured.

This court's holding that claims falling within the parameters of the hanging paragraph must be paid in full and cannot be bifurcated, is supported by the legislative history of the statute. As noted in In re Annie M. Turner, No. 05-45355, 2006 Bankr. LEXIS 628, (Bankr. S.C. Mar. 31, 2006), the 2005 House Report concerning Senate Bill 256 ("S.256") provides:

> **Protections for Secured Creditors.** S. 256's protections for secured creditors include a prohibition against bifurcating a secured debt incurred within the 910-day period preceding the filing of a bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the debtor's personal use.

H.R. REP. No. 109-31, pt. 1, at 17 (2005), as reprinted in as reprinted in E-2 COLLIER ON BANKRUPTCY at App. Pt. 10-268 (Lawrence P. King et al. eds., 15th ed. revised 2005). See, Turner, No. 05-45355, 2006 Bankr. LEXIS 628, at *12 (Bankr. S.C. Mar. 31, 2006).

Members of Congress dissenting from enactment of the S.256 also recognized that:

> The legislation would also largely eliminate the possibility of loan bifurcations in chapter 13 cases. Under current law a debtor is permitted to bifurcate a loan between the secured and unsecured portions. The debt is treated as a secured debt up to the allowed value of the property securing the debt. The remainder of the debt is treated as a non-priority unsecured debt. Section 306 of [S.256] prevents such bifurcation (including with regard to interest and penalty provisions) with respect to any loan for the purchase of a vehicle in the 910 days before bankruptcy ....

H.R. REP. No. 109-31, pt. 1, at 554 (2005), as reprinted in E-2 COLLIER ON BANKRUPTCY at App. Pt. 10-903 (Lawrence P. King et al. eds., 15th ed. revised 2005). See, Turner, No. 05-45355, 2006 Bankr. LEXIS 628, at *12 (Bankr. S.C. Mar. 31, 2006).

Other courts have agreed that the hanging paragraph of §1325 merely means that such claims cannot be bifurcated. See, In re Fleming, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006) ("...[E]ach [910] Car Creditor's secured claim is allowed in the amount of the balance owed as of the petition date. The value of the collateral is irrelevant in determining the allowed amount of the secured claim ...."); In re Wright, 338 B.R. 917, 919-20 (Bankr. M.D. Ala. 2006) ("Simply put, the claims of these creditors must be treated as fully secured under the plan."); In re Horn, 338 B.R. 110, 113 (Bankr. M.D. Ala. 2006) ("The current law, however, prevents the application of §506, that is, the bifurcation of a secured claim into secured and unsecured portions .... If §506 does not apply, the creditor's claim must be treated under the plan as fully secured."); In re Johnson, 337 B.R. 269, 272(Bankr. M.D. N.C. 2006) ("The statute simply provides that debtors may not bifurcate the claims .... Such a creditor is entitled to the full payment of his contractual claim...."); In re Murray, 346 B.R. 237, 245 (Bankr. M.D. Ga. 2006) and adhered to on reconsideration by, No.05-48017, 2006 WL 2457851, 2006 LEXIS 1842 (Bankr. M.D. Ga. Aug. 22, 2006)("...[Section] 1325(a)(*) serves only to prevent the bifurcation of a secured claim

under §506 and does not disqualify a claim from the status of an 'allowed secured claim' for purposes of applying §1325(a)(5) and its present value requirement."); In re Montoya, 341 B.R. 41, 47 (Bankr. D. Utah 2006) ("...[Section] 1325(a)(5) can no longer be used to cram down a 910-day vehicle claim."); and In re Brooks, 344 B.R. at 422(Bankr. E.D. N.C. 2006) ("...[I]n order to confirm a Chapter 13 plan with a 910 claim, the plan must provide for full payment of the secured claim...."). But see, In re Carver, 338 B.R. 521 (Bankr. M.D. Ga. 2006)(holding that a 910-day claim on motor vehicle is neither an unsecured claim nor an allowed secured claim and that §1325(a)(5) is not applicable to 910-day motor vehicle claim.); and In re Wampler, 345 B.R. 730,(Bankr. Kan. 2006) (holding that 910-day claims are "allowed" claims, but not "allowed secured" claims for purposes of §1325(a)(*) and therefore, if the debtor retains the vehicle, such claims must be paid in full, but without post-petition interest.)

Interest

While the court holds that the hanging paragraph prevents such claims from being bifurcated into secured and unsecured claims, nothing in the paragraph or any other Bankruptcy Code provision prevents a debtor from modifying a creditor's rights pursuant to 11 U.S.C. §1322(b)(2). Therefore, the applicable interest rate

necessary to fulfil the "present value requirement" of 11 U.S.C. §1325(a)(5)(B)(ii) still is governed by Till v. SCS Credit Corp., 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004).

Other courts have agreed that the hanging paragraph does not overrule Till. See, In re Brown, 339 B.R. at 822 ("...[N]o provision of BAPCPA prohibits the modification of secured creditors' rights under §1322(b)(2). Consequently, while 910 Creditors are entitled to fully-secured claims, the applicable interest rate necessary to meet the present value requirement of §1325(a)(5)(B)(ii) is governed by Till...."); In re Brooks, 344 B.R. at 422("Till has not been abrogated by BAPCPA and it is the appropriate rate of interest to apply to 910 claims."); In re Murray, 346 B.R. at 245 (Bankr. M.D. Ga. 2006) and adhered to on reconsideration by, No.05-48017, 2006 WL 2457851, 2006 LEXIS 1842 (Bankr. M.D. Ga. Aug. 22, 2006)("Clearly, therefore, Till, with its mandate regarding the payment of post-petition interest, is not abrogated. Secured claims qualifying under §1325(a)(*) shall be paid at the interest rate set forth in Till so as to satisfy the present value requirement of §1325(a)(5)."); In re Robinson,338 B.R. 70, 75 (Bankr. W.D. Mo. 2006) ("In sum, I conclude that the BAPCPA amendments did not overrule Till."); In re Wright, 338 B.R. at 920 ("...Till has not been abrogated by the BAPCPA amendments."); In re

Shaw, 341 B.R. 543, 547 (Bankr. M.D. N.C. 2006) ("...[G]iven Congress's knowledge of the Till decision and Congress's decision not to change to the applicable statutory language when enacting BAPCPA, this court concludes that the Till rate remains the proper interest rate with which secured claims must be paid to meet the requirements of §1325(a)(5)(B)(ii)."); In re Fleming, 339 B.R. at 724 ("A creditor whose claim comes within the 910 Day Car Language contained in Section [1329(a)(*)] of the Bankruptcy Code is entitled to receive post-petition interest at a current rate determined by an adjustment from the prime rate based on the risk of nonpayment under Till."); and In re DeSardi, 340 B.R. 790, 794 (Bankr. S.D. Tex. 2006)("The interest rate to be paid to an automobile lender under BAPCPA should be determined in accordance with In re Till ...."). But see, In re Wampler, 345 B.R. 730,(Bankr. Kan. 2006) (holding that 910-day claims are "allowed" claims, but not "allowed secured" claims for purposes of §1325(a)(*) and therefore, if the debtor retains the vehicle, such claims must be paid in full, but without post-petition interest.).

Conclusion

It is therefore ORDERED that the objection of Credit Union of Texas to Confirmation requiring its claim to be fully secured is

SUSTAINED and the objection requiring the contract rate of interest to be paid is OVERRULED. It is further ORDERED that within thirty (30) days from the date of this order, Debtor shall amend his plan to comply with this order, or the case will be dismissed.

Susan D. Barrett

SUSAN D. BARRETT
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 6th Day of September, 2006.